Supreme Court, U. S.
FILED
MAR 27 1979
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

1978-79 TERM

No. 78-1485

IN RE: SPECIAL GRAND JURY PROCEEDINGS
EDWARD T. HANLEY, et al.,
Petitioners,

v.

THE HONORABLE DAVID S. PORTER

and

UNITED STATES OF AMERICA,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

ARNOLD MORELLI
503 Executive Building
35 E. 7th Street
Cincinnati, Ohio 45202
513-241-3676
Counsel for Petitioners

COURT INDEX PRESS, INC. — 215 E. Ninth Street, Cincinnati, Ohio 45202 — (513) 241-1450

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioners, the Executive Board members and/or general officers of the Hotel and Restaurant Employees and Bartenders International Union (hereinafter "union"), respectfully pray that a Writ of Certiorari issue to review the Order of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on December 28, 1978 and on January 30, 1979 respectively. Copies of such Orders are appended hereto at pages 1a and 3a.

STATEMENT OF JURISDICTION

1. Petitioners respectfully seek a review of the Order of the United States Court of Appeals for the Sixth Circuit entered on December 28, 1978, overruling petitioners' Complaint for a Writ of Mandamus directing the District Court to dissolve a grand jury proceeding which is currently in session in the United States District Court for the Southern District of Ohio, and to hold for naught all of its actions.

2. Petitioners' Request for Reconsideration by the Court of Appeals for the United States Sixth Circuit of its previous order was denied by order dated January 30, 1979. No extension of time within which to petition for certiorari has been made.

3. This Court's jurisdiction is conferred by 28 USC § 1254 (1).

QUESTIONS PRESENTED FOR REVIEW

1. Whether certain inquiries directed to potential members of a special grand jury by the Honorable Timothy S. Hogan, United States District Judge for the Southern District of Ohio, and the exclusion of potential members by the Court based upon affirmative responses to those inquiries violated the provisions of 28 USC § 1861 et seq. and require the dismissal of the special grand jury.

STATUTORY PROVISIONS INVOLVED

1. 28 USC § 1861. Declaration of policy.

"It is the policy of the United States that all litigants in Federal courts entitled to trial by jury shall have the right to grand and petit juries selected at random from a fair cross section of the community in the district or division wherein the court convenes. It is further the policy of the United States that all citizens shall have the opportunity to be considered for service on grand and petit juries in the district courts of the United States, and shall have an obligation to serve as jurors when summoned for that purpose."

As amended Mar. 27, 1968, Pub.L. 90-274, § 101, 82 Stat. 54.

2. 28 USC § 1862. Discrimination prohibited.

"No citizen shall be excluded from service as a grand or petit juror in the district courts of the United States on account of race, color, religion, sex, national origin, or economic status."

3. 28 USC § 1866 (c). Selection and summoning of jury panels.

"(c) Except as provided in section 1865 of this title or in any jury selection plan provision adopted pursuant to paragraph (5), (6), or (7) of section 1863 (b) of this title, no person or class of persons shall be disqualified, excluded, excused, or exempt from service as jurors."

4. 28 USC § 1867 (e). Challenging compliance with selection procedures.

"(e) The procedures prescribed by this section shall be the exclusive means by which a person accused of a Federal crime, the Attorney General of the United States or a party in a civil case may challenge any jury on the ground that such jury was not selected in conformity with the provisions of this title. Nothing in this section shall preclude any person or the United States from pursuing any other remedy, civil or criminal, which may be available for the vindication or enforcement of any law prohibiting discrimination on account of race, color, religion, sex, national origin or economic status in the selection of persons for services on grand or petit juries."

STATEMENT OF THE CASE

A. Procedural Posture.

This action was an original action in mandamus filed in the United States Court of Appeals for the Sixth Circuit pursuant to the provisions of the All Writs Statute, 28 USC § 1651, Rule 21 of the Federal Rules of Appellate Procedure, and the appellate court's inherent supervisory power and authority over the conduct and proceedings of grand juries convened in the United States District Court for the Southern District of Ohio. Petitioners prayed in the Complaint that a writ issue directing the dissolution of a special grand jury then in session because of defects in the selection processes utilized by the District Court and holding all proceedings of said special grand jury for naught.

The original proceeding in mandamus was preceded by the filing by the petitioners on April 14, 1978 with the United States District Court for the Southern District of Ohio, Western Division, of a Motion to Stay and Dissolve the Special Grand Jury Proceeding, in which petitioners brought to the attention of the Court a number of violations of law in connection with the grand jury proceedings, including the improper selection processes. This Motion was assigned to respondent, The Honorable David S. Porter, District Judge for the United States District Court for the Southern District of Ohio, and on or about August 10, 1978, respondent issued an order denying petitioners' motions to stay and dissolve the special grand jury proceedings, and such order was followed by an opinion filed on August 30, 1978. Photostatic copies of the order and opinion are attached to this Petition in 4a and 5a. Moreover, respondent, The Honorable David S. Porter declined to certify the issue of exclusion of union members from the grand jury as requested by counsel pursuant to 28 USC § 1292 (b).

B. Statement Of Facts.

Beginning in February, 1977, a special grand jury was convened in the Southern District of Ohio at the instance of the Department of Justice and its agents for the purpose of conducting an investigation of the Hotel and Restaurant Employees and Bartenders International Union, its general officers and Executive Board members, concerning possible violations of law. On or about August, 1977, the first special grand jury investigating these matters was discharged, and proceedings were then continued before a second special grand jury, which was impaneled on or about September 28, 1977, in proceedings before the Honorable Timothy S. Hogan, District Judge of the United States District Court for the Southern District of Ohio, Western Division. This second special grand jury has been in session from and after that date until the present time.

During the course of proceedings conducted on September 28, 1977 before the Honorable Timothy S. Hogan with reference to the impaneling of the second special grand jury, the Court directed questions to prospective grand jurors as to whether any of them belonged to a labor union, in the following manner:

> "Now, does anybody work for any labor union? Any close members of any of your family, that is your immediate family – wife, husband, brother, sister, son, mother, father – any of the close members of your family work for any labor union or have any connection with a labor union?" (35a)

The Court received affirmative responses to these questions from a Miss Judith Anderson, who responded that

she was a receptionist with the Hotel and Restaurant Employees and Bartenders International Union, and a Miss Basford, who responded that she was a member of Amalgamated Clothing Union. These were the only affirmative responses to the Court's inquiries. Both Miss Anderson and Miss Basford were excused from consideration from grand jury service on the basis of their responses to the Court's inquiries. (35a)

On August 9, 1978, during the course of an evidentiary hearing on the Motion to Dismiss the Grand Jury before respondent, the Honorable David S. Porter, petitioners presented expert testimony from a William T. Sheehan regarding the exclusionary effect and impact of the exclusion of the union-affiliated members by the Honorable Timothy S. Hogan. During the course of his testimony, Mr. Sheehan stated that the test utilized by the Court resulted in the exclusion of from 41% to 42% of registered voters in Hamilton County, Ohio from service on the grand jury.

ARGUMENT FOR WRIT OF CERTIORARI

THE EXCLUSION OF POTENTIAL GRAND JURORS IN THIS CASE CLEARLY AND PLAINLY VIOLATES THE PROVISIONS OF THE JURY SELECTION AND SERVICE ACT OF 1968, 28 USC § 1861 et seq.

The notion that the right to trial by jury guaranteed by the Sixth Amendment of the United States Constitution includes the right to fair and adequate selection procedures for grand and petit juries is one which finds consistent support in the decisional law of this Court as well as Congressional legislation declaring it to be the policy of the United States that grand and petit juries be fairly selected.

Under 28 USC § 1861, Congress declared that:

> "It is the policy of the United States that all litigants in Federal courts entitled to trial by jury shall have the right to grand and petit juries selected at random from a fair cross section of the community in the district or division wherein the Court convenes."

The exclusion of an *entire class* – organized labor – from service on a grand jury violates the first principles of this Congressionally-declared policy and prior case law of this Court.

First of all, the exclusion of potential grand jurors which occurred on September 28, 1977 clearly and plainly violates the provisions of 28 USC § 1862, which provides that:

> "No citizen shall be excluded from service as a grand or petit juror in the District Courts of the United States on account of . . . . economic status."

Such exclusion also constituted an exclusion of a "class

of persons" in violation of 28 USC § 1866 (c) and 28 USC § 1867 (e).

Moreover, both the legislative history of the Jury Selection and Service Act of 1968 (28 USC § 1861 et seq.), as well as case law mandate the conclusion that "organized labor" is a "cognizable group" protected by the terms of the statute from discrimination.

First, in House Report No. 1076 in consideration of the Jury Selection and Service Act of 1968, the judiciary committee, in discussing and considering the effect that the Act would have on the elimination of the discriminatory effect of key man selection systems, stated the following (1968 US Code Congressional and Administrative News, Vol. 2, p. 1794 fn. 1):

> "In the recent case of *Rabinowitz* v. *U.S.*, 366 F.2d 34 [1966], the operation of the key man system in one set of circumstances was condemned, even though it was stipulated that the officials responsible for selection did not conscientiously engage in discriminatory practices. The United States Court of Appeals for the Fifth Circuit *en banc* concluded that the key man system in question led to a jury list that did not represent a fair cross section of the community. In *Rabinowitz, the key man system condemned resulted in under representation of negroes on the jury lists, but the discriminatory impact of the system is not limited to racial discrimination. Often the system results in under representation of craftsmen, service workers, and laborers as compared with the professional and managerial classes.*" (emphasis added).

This consideration was prophetic and directly applicable to the circumstances of the instant case, wherein an entire class of "organized labor" was excluded from grand jury service. This clear and unmistakable declaration of

Congressional intent was wholly ignored by the respondent in this case.

In addition, the consideration of "organized labor" as a cognizable class is supported by recent case law. In the case of *Taylor* v. *Louisiana*, 419 US 522 (1975), Justice White, speaking for seven members of this Court, held that the selection of a petit jury from a representative cross section of the community was an essential component to the Sixth Amendment right to a jury trial. An exclusion which applies to approximately 40% of the registered voters of this community, which was the effect of the exclusion in this case, patently violates such a requirement.

In *Swain* v. *Alabama*, 380 US 202 (1965), this Court stated the following (*Id.* at 204-205):

> "Nor is the constitutional command forbidding intentional exclusion limited to negroes. It applies to any identifiable group in the community which may be the subject of prejudice."

In addition, the vice of the exclusion utilized in this case was stated as follows by Justice Marshall in the case of *Peters* v. *Kiff*, 407 US 493, 504 (1972):

> "When any large and identifiable segment of the community is excluded from jury service, the effect is to remove from the jury room qualities of human nature and varieties of human experience, the range of which is unknown and perhaps unknowable. It is not necessary to assume that the excluded group will consistently vote as a class in order to conclude, as we do, that its exclusion deprives the jury of a perspective on human events that may have unsuspected importance in any case that may be presented."

Courts which have considered the issue of "economic status" as applied to the business or labor communities have

given meaning and content to the argument presented here that organized labor is such a cognizable class. In *U.S.* v. *Gurney,* 393 F.Supp. 688, 705 (M.D. Fla. 1970), the court held that sole proprietors of businesses constitute a cognizable class. In respect of "blue collar workers" as a cognizable group, we refer the Court to *U.S.* v. *DiTommaso,* 405 F.2d 385 (4th Cir. 1965). And in *Faye* v. *New York,* 332 US 261 (1947), this Court indicated that lack of education is not a disqualifying factor, and that the laws of the United States do not provide for "blue ribbon" juries.

Recently, this court has had occasion to again consider the "fair cross section" requirements in jury selection processes. In *Duren* v. *Missouri,* — U.S. —, 24 Cr.L. 3037 (January 9, 1979), this court invalidated a Missouri procedure that allowed women to automatically claim exemption from service on petit juries by returning the summons or simply not reporting. The evidence in that case indicated that although women represented 54% of the adults in the forum county, only 14.5% served on jury panels. The defendant, who was convicted of murder, had an all male jury which was selected from a panel of 53, only 5 of which were women. This court held that this underrepresentation violated the defendant's right to trial by a jury comprised of a fair cross section of the community. The Court quoted language from *Taylor* v. *U.S.,* 419 US 522 (1975), that petit juries "must be drawn from a source fairly representative of the community" and that they "must not systematically exclude distinctive groups in the community and thereby failed to be reasonably representative thereof." (24 Cr.L. at 3039). Although *Duren* dealt with petit juries, its concepts and concerns apply as well to grand juries. In *Duren,* there was only an underrepresentation of 70% of the excluded class, i.e., women.

In the instant case, there has been a total exclusion of the class, i.e., organized labor.

Finally, the relief requested, the discharge of the grand jury, is in no sense premature or a waste of judicial effort for economy, since a grand jury constituted in violation of 28 USC § 1861 et seq. is incapable of returning a valid indictment. *Thiel* v. *Southern Pacific Company,* 328 US 217; *Ballard* v. *U.S.,* 320 US 187. In *Ballard,* the Supreme Court stated the following (Id. at 195-196):

> ". . . but, as we have said, the grand jury was likewise drawn from a panel improperly chosen and therefore the indictment was not returned in accordance with the the procedure established by Congress. Accordingly, the indictment must be dismissed."

CONCLUSION

The exclusion by the District Court of the class of organized labor from representation on the grand jury in this case clearly and plainly violates the policy and provisions of the Jury Selection and Service Act of 1968. The exclusion of this class from service on the grand jury requires review and reversal by this Court of the Order of the United States Court of Appeals for the Sixth Circuit. For these reasons, a Writ of Certiorari should issue to review the judgment and order of the Sixth Circuit.

Respectfully submitted,

ARNOLD MORELLI

COUNSEL FOR PETITIONERS

503 Executive Building
35 E. 7th Street
Cincinnati, Ohio 45202
Tel. (513) 241-3676

APPENDIX

NO. 78-3466

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

EDWARD T. HANLEY, ET AL.

Petitioners

v.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION; AT CINCINNATI

Respondent

ORDER

(Filed December 28, 1978)

Before: LIVELY and ENGEL, Circuit Judges, and PECK, Senior Circuit Judge.

This cause is before the Court on the petitioners' application for a writ of mandamus ordering the district court to dissolve the grand jury which is currently proceeding and to hold for naught all of its actions; petitioners also have moved for an order directing that all matters relevant to their petition for mandamus be dealt with in camera, and that all documents filed in relation thereto be sealed.

Upon consideration of the petition and the authorities presented by the parties the Court concludes that the petitioners have failed to show their entitlement to the extraordinary writ; *Will* v. *Calvrt Life Insurance Co.*, — U.S. —, 46 L.W. 4811 (1978); *Roche* v. *Evaporated Milk Association*, 319 U.S. 21 (1943); *Bankers Life & Casualty Co.* v. *Holland*, 346 U.S. 379 (1953).

It is therefore ORDERED that the petition be, and it hereby is, overruled; it is further ORDERED that all documents relevant to this action be sealed and made unavailable to the public until such time as the papers in case No. MS-1-78-19 on the docket of the District Court for the Southern District of Ohio cease to be treated as confidential, or except as otherwise specifically ordered by this Court.

ENTERED BY ORDER OF THE COURT

/s/ JOHN P. HEHMAN
Clerk of Court

No. 78-3466

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

EDWARD T. HANLEY, ET AL.,
Petitioners

v.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION; AT CINCINNATI

ORDER

(Filed January 30, 1979)

Before: LIVELY and ENGEL, Circuit Judges, and PECK, Senior Circuit Judge.

This cause is before the Court on the petitioners' request for reconsideration by this Court of its order of December 28, 1978 denying their application for a writ of mandamus.

The Court has carefully considered the petition for rehearing and the memorandum in support thereof, and concludes that the petition is not well taken.

It is therefore ORDERED that the petition be, and it hereby is, denied.

ENTERED BY ORDER OF THE COURT

/s/ JOHN P. HEHMAN

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

NO: MS-1-78-19

IN RE: SPECIAL GRAND JURY PROCEEDINGS

HOTEL AND RESTAURANT EMPLOYEES
AND BARTENDERS INTERNATIONAL UNION

and

EDWARD T. HANLEY, et al.,

vs.

UNITED STATES OF AMERICA

ORDER

(Filed August 10, 1978)

This cause came on for hearing on the motion and amended motions to stay and dissolve special Grand Jury proceedings, for a protective order and to quash subpoenas. It was submitted on the submissions in the file, including memoranda and affidavits, as well as the evidence and arguments.

After consideration, the Court finds the motions not well taken and they are therefore denied. Opinion to follow.

SO ORDERED.

/s/ DAVID S. PORTER
Chief, Judge,
United States District Court

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

NO: MS-1-78-19

IN RE SPECIAL GRAND JURY PROCEEDINGS

HOTEL AND RESTAURANT EMPLOYEES'
AND BARTENDERS' INTERNATIONAL UNION,
Plaintiff,

vs.

UNITED STATES OF AMERICA,
Defendant.

OPINION

(Filed August 30, 1978)

PORTER, C.J.:

This case is before the Court on a motion to stay and dissolve special grand jury proceedings, for a protective order, and to quash subpoenas. Movants seek relief under the Court's inherent supervisory power and authority over the conduct and proceedings of grand juries convened in this district.

Movants are a labor union and several of its officers who have been the subject of inquiry by said special grand jury, and are putative targets of its investigation. They

make twelve allegations in support of their motion. They are as follows:

1) All persons who were members of a labor organization, who were affiliated in any way with a labor organization, or who were within the immediate family of a member of a labor organization systematically were excluded from service on said special grand jury in violation of 28 U.S.C. § 1862;

2) Prejudicial remarks were made to grand jury witnesses by an investigator apparently associated with the United States Department of Justice Organized Crime Strike Force, which has been conducting said grand jury proceedings;

3) An Assistant United States Attorney associated with said grand jury investigation has made direct and derivative use of documents and records unlawfully obtained from the Department of Labor in violation of the Privacy Act, 5 U.S.C. §§ 552 *et seq*;

4) Evidence and other information acquired by the Department of Justice during the course of said grand jury proceedings has been exchanged and interchanged by and between said special grand jury and grand juries convened in the Northern District of Illinois and the Northern District of California;

5) Representatives of certain federal agencies assisting the Department of Justice in its investigation have disclosed the contents of individual income tax returns to persons having no material interest therein, in violation of 26 U.S.C. § 6103 and regulations promulgated thereunder;

6) Mail addressed to various officers of Movant Union unlawfully was diverted to the Internal Revenue Service, examined, resealed, and subsequently was delivered to addressees under the pretext of having been mistakenly diverted and opened in error;

7) Evidence regarding the Union and its officers, executive board members and personnel have been presented to two grand juries in contravention of Department of Justice regulations prohibiting such conduct;

8) Government attorneys associated with said investigation improperly have utilized the subpoena power for the purpose of interviewing and questioning potential witnesses outside the grand jury proceeding, and in doing so have violated an asserted obligation to place before said grand juries all evidence favorable to the targets of said investigation, or tending to mitigate suspected offenses;

9) Government attorneys and investigators associated with said investigation improperly have threatend various witnesses with indictment in the event that such witnesses failed to proffer evidence to the grand jury;

10) Government attorneys and investigators associated with said investigation have obtained certain documents and records in the custody of Movant Union in a manner violative of the rights of individuals involved, as guaranteed by the fourth amendment;

11) An investigator employed by the Department of Labor and in charge of that department's investigation of Movant Union for a period covering several months improperly has actively assisted in said Department of Justice investigation and grand jury proceedings;

12) Said grand jury proceedings have resulted in massive publicity regarding Movants and viola-

tions of federal law of which Movants are suspected.

The issues raised in this case were thoroughly briefed on both sides and independently researched by the Court. Hence, after a closed hearing on August 9, 1978 in which the Court heard evidence and arguments on these matters, the Court found itself in a position to, and did act on petitioners' motions from the bench. The Court concluded that the claims advanced by petitioners would justify neither dissolution of the grand jury nor quashing any indictments and/or subpoenas said grand jury may issue. Accordingly, we denied these motions, but expressly reserved our right to issue protective orders as found appropriate at some future time. We informed the parties that this Opinion would follow.

At the outset we note that in addition to the other grounds for our decision set forth herein, our rulings in regard to each of the matters raised by Movants are justified by general principles of ripeness.

The basic notion on which the ripeness doctrine rests is that judicial machinery should be conserved for problems which are real and present or imminent, not squandered on problems which are abstract, hypothetical, or remote. Davis, *Administrative Law Text* § 21.01 (1972). The central concern is whether the tendered case involves uncertain or contingent future events that may not occur as anticipated, or may not occur at all. 13 Wright, Miller & Cooper, *Federal Practice and Procedure* § 3532.[1] Although

[1] Closely intertwined is the doctrine of standing. In the standing context the court must inquire whether the likelihood or threat of a future occurrence is effective to cause present injury and thereby confer present standing to seek judicial review. *See Laird* v. *Tatum*, 408 U.S. 1 (1972). We find the standing requirements satisfied in this case, with certain exceptions noted herein.

Article III requires in the ripeness context only that the contemplated event will in all likelihood occur, *see Blanchette* v. *Connecticut General Insurance Corp.*, 419 U.S. 102, 143 (1974) [*Regional Rail Reorganization Act Cases*], the doctrine also is grounded on prudential considerations and, although Article III may be satisfied, a court may in some cases defer review until such time as the controversy becomes more concrete or immediate.

Although we find Movants' claims to be ripe in the Article III sense, we also conclude that this case is not in a posture in which it would be expedient or wise for the Court to exercise its equitable powers, and in doing so interfere with the grand jury process. This Court is guided by the Supreme Court's admonition in *United States* v. *Dionisio*, 410 U.S. 1 (1973) that the grand jury should not be "saddle[d] . . . with minitrials and preliminary showings [which] would assuredly impede its investigation and frustrate the public's interest in the fair and expeditious administration of the criminal laws." 410 U.S. at 17. We believe that it would disserve the public weal to enlarge the number of dilatory motions available to defense counsel by recognizing them at the pre-indictment stage. To do so would impede prosecuting attorneys and the grand jury without, save for a few rare circumstances, affording potential defendants any relief not available after indictment. *Centracchio* v. *Garrity*, 198 F. 2d 382 (1st Cir. 1952). We therefore conclude that until such time as an indictment is issued against Movants by the grand jury in question, relief on these claims would be inappropriate. *Cf. Aetna Life Ins. Co.* v. *Haworth*, 300 U.S. 227, 240-41 (1937).

However, we recognize that many or all of the issues raised by Movants may again be before the Court in the event that indictments are issued against the Union and/or

its officers. We therefore will discuss with particularity each of Movants' claims.

A. Systematic Exclusion

General notions of ripeness aside, Movants' claim of systematic exclusion clearly is premature under the Federal Rules of Criminal Procedure. Rule 6(b)(1) provides in pertinent part:

> [A] defendant who has been held to answer in the district court may challenge the array of jurors on the ground that the grand jury was not selected, drawn or summoned in accordance with law, and may challenge an individual juror on the ground that the juror is not legally qualified. Challenges shall be made before the administration of the oath to the jurors . . . .

Thus, the rule by its terms limits pre-indictment challenges to the grand jury array to defendants who have been "held to answer in the district court" and who make their challenges "before the administration of the oath to the jurors." In effect, such challenges are available in advance of indictment only where the Movant both is arrested and challenges the array before administration of the oath. 1 Wright, *Federal Practice and Procedure, Criminal* § 102. *See United States* v. *Elksnis*, 259 F. Supp. 236 (S.D. N.Y. 1966). Since Movants in this case have satisfied neither of these requirements, their challenge is premature.[2]

In any case, the Court finds that Movants have failed to show systematic exclusion. Movants have the burden

[2] 28 U.S.C. § 1867 provides no support for movants' position that they presently are entitled to challenge the grand jury array. As regards criminal cases, the mechanism contained therein applies only to "dismiss the indictment or stay the proceedings" (§ 1867(a)). Nowhere does the statute refer to dissolution of a grand jury. This case therefore is controlled by F. R. Crim. P. Rule 6.

of showing, *prima facie*, discriminatory selection practices. *United States* v. *Butera*, 420 F. 2d 564, 569 (1st Cir. 1970). *See Swain* v. *Alabama*, 380 U.S. 202, 209 (1965). Purposeful discrimination may not be assumed or merely asserted. *Swain* v. *Alabama*, 380 U.S. at 205.

In claiming systematic exclusion, Movants have focused on 28 U.S.C. §§ 1861, *et seq.*, which requires the district courts to adopt a "written plan for random selection of grand and petit jurors" (28 U.S.C. § 1863(b)(5)) designed to provide "juries selected at random from a fair cross section of the community" (28 U.S.C. § 1861) and to guard against discrimination in jury selection (28 U.S.C. § 1862). Movants correctly state that the selection plan must specify the identifiable groups of persons or occupational classes whose members shall be excused "on individual request therefor." 28 U.S.C. § 1863(b)(5). Movants claim that Judge Hogan, who also is on the bench in this district, acted in excess of his statutory powers by excusing two potential grand jurors on his own initiative.

We think that the challenge to the *sua sponte* character of Judge Hogan's action really is a challenge separate and distinct from the claim of systematic exclusion. The Court therefore first will direct its attention to the former, then to the latter.

We do not need to decide whether Judge Hogan erred in excusing two potential grand jurors on his own initiative. We are able to dispose of Movants' claim without reaching this question because we think that Movants in any case are without standing to make this challenge. Since Movants were not entitled to be represented at the grand jury *voir dire*, Judge Hogan's actions cannot in any sense be said to have violated any right belonging to Movants. In the absence of systematic exclusion of a cognizable group from the grand jury (a matter taken up below), the only

right even arguably violated was the right not to have potential jurors excluded in the absence of objection. We think this a right belonging to those who were entitled to be present and make such objections, *i.e.*, the government through its attorneys. We therefore hold that Movants are without standing to challenge Judge Hogan's action in this regard. *See Tileston* v. *Ullman,* 318 U.S. 44 (1943).

Movants fail on this point for additional reasons. The exclusive ground for challenging jury selection procedures under the Jury Selection Act, 28 U.S.C. §§ 1961 *et seq.*, is "substantial failure to comply" with its provisions. *United States* v. *Davis,* 546 F. 2d 583, 589 (5th Cir. 1977), *citing* 28 U.S.C. § 1867 (a), (e). As the Fifth Circuit stated in *United States* v. *Evans,* 526 F. 2d 701 (5th Cir), *cert. denied,* 429 U.S. 818 (1976):

> Congress, recognizing that there would undoubtedly be error in the jury selection process that should not result in the dismissal of an indictment, left room for harmless error by providing that dismissal should lie only when there was a *substantial* failure to comply with the Act.

526 F. 2d at 705. (Emphasis in original.)

We find that Judge Hogan's having acted on his own initiative (assuming *arguendo* it was a violation) was, at most, a "technical deviation" as opposed to a substantial departure. There is no evidence that his having acted without request from the government attorneys "operated to frustrate the goals of the Act." *United States* v. *Evans,* 526 F. 2d at 706. Movants therefore are not entitled to relief on this point. *United States* v. *Davis,* 546 F. 2d at 589.

Similarly, as noted above. Movants fail on their claim of systematic exclusion. The Jury Selection Act establishes

the right of all litigants to have grand juries selected at random from a fair cross-section of the local community. 28 U.S.C. §§ 1861 *et seq.* In order to make out a case of systematic exclusion under § 1861, Movants must establish the exclusion of a "cognizable group." *United States* v. *Potter,* 552 F. 2d 901, 903 (9th Cir. 1977). The cognizability requirement generally is said to derive from the following language contained in *Hernandez* v. *Texas,* 347 U.S. 475 (1954):

> Whether such a group exists within a community is a question of fact. When the existence of a distinct class is demonstrated and it is further shown that the laws, as written or as applied, single out that class for different treatment not based on some reasonable classification, the guarantees of the Constitution have been violated . . . .

347 U.S. at 478. *See Foster* v. *Sparks,* 506 F. 2d 805, 819 (5th Cir. 1975). The essence of the cognizability requirement is the need to delineate an identifiable, cohesive group which in some objectively discernible, concrete way is distinct from the rest of society, and whose viewpoint cannot adequately be represented if the group is excluded from the jury selection process. The group must have a common interest which cannot adequately be protected by the rest of the populace. *United States* v. *Potter,* 552 F. 2d at 904; *United States* v. *Guzman,* 337 F. Supp. 140, 143-44 (S.D. N.Y.), *aff'd,* 468 F. 2d 1245 (2d Cir.), *cert. denied,* 410 U.S. 937 (1973). Congnizability rests both on the size of the putative group and the unique nature of the prejudice which affects it. *Foster* v. *Sparks,* 506 F. 2d at 820.

Although Movants through expert testimony adequately have established that members of labor organizations comprise a group of sufficient size, they have failed to con-

vince the court that this group is cohesive in respect of some common interest which cannot adequately be represented by the rest of the populace. To the contrary, we take judicial notice that the character of this group is both heterogenous and fluid. A classification based solely on union membership takes no account of other factors such as actual income, personal history, ethnic background, and the like. Such a group would include a wide range of persons, including both the well-off and the poor. Union members have divergent attitudes and characteristics which defy classification. *Compare United States* v. *Kleifgen,* 557 F. 2d 1293, 1296 (9th Cir. 1977). As another court has stated in an analogous context, "[u]sing [Movants'] approach, the possibilities are virtually limitless for defining a 'class' and finding that it lacks representation on the jury list." *United States* v. *Valentine,* 288 F. Supp. 957, 974 (D. Puerto Rico 1968). *See United States* v. *Kleifgen,* 557 F. 2d at 1296; *United States* v. *McDaniels,* 370 F. Supp. 298, 306 (E.D. La. 1973). We therefore conclude that union members do not comprise a group cognizable under § 1861 of the Jury Selection Act.

Nor does union membership comprise a recognizable "economic status" under § 1862 of the Act. As noted above, the Court takes judicial notice that union membership includes a widely heterogenous group, cutting across economic strata. Thus, we can discern no violation of § 1862.

Finally, the claim of systematic exclusion must fail for an additional, independent reason. Put simply, Movants have shown only that Judge Hogan excused for cause two potential grand jurors, Judith Anderson and Dolores Basford, each of whom was in some way connected with a labor union. Judge Hogan has filed with the Court a Certificate In Amplification Of The Record (doc. 22).

This explanation leaves no doubt as to the propriety of his action.

Judge Hogan explains that on *voir dire* he questioned the jury venire about union membership. He explained to the jury that he harbored no anti-union animus, but that "[t]here is a possibility of some investigation by this grand jury into something that may be union-connected. . . ." (Tr. Sept. 28, 1977, at 5-6). Ms. Anderson subsequently identified herself as employed by the Hotel & Restaurant Employees & Bartenders International Union; Ms. Basford stated that she belonged to the Amalgamated Clothing Union.

Anderson was excused because of her connection with the subject union. At that time there also were in the courtroom several members of the panel who also were going to be discharged for other reasons. Judge Hogan reasoned that "if only Anderson had been excused [and not Basford], it would have amounted to a disclosure to those . . . about to be discharged that the union referred to was the Hotel & Restaurant Employees & Bartenders International Union. That was considered undesirable and for that reason, to dilute the identification, Basford was excused" (doc. 22, Certificate In Amplification Of The Record, at 1-2).

"A litigant has no vested right to keep a particular juror on the panel," and the court has "broad discretion" in excusing veniremen whom it has reason to believe may not be able to render an impartial decision. *United States* v. *Rodriquez,* 459 F. 2d 983, 984 (9th Cir. 1972). Absent systematic exclusion under the Act, a litigant's right in this connection "is one of rejection and not of selection." *United States* v. *Kline,* 221 F. Supp. 776, 783 (D. Minn. 1963). The decision whether to seat or excuse a potential juror is committed to the discretion of the Court,

and may be disturbed only on a showing of abuse thereof. *Anderson* v. *Dun & Bradstreet, Inc.*, 543 F. 2d 732, 734 (10th Cir. 1976).

We doubt that Movants seriously and unblushingly would challenge as an abuse of discretion Judge Hogan's having excused Ms. Anderson. We also are unable to find abuse of discretion in Judge Hogan's having excused Ms. Basford. Under the circumstances, Judge Hogan appears to have taken the wisest course of action. This is particularly true in light of our conclusion that union membership does not denote a group cognizable under the Jury Selection Act. On this record, there clearly is no abuse of discretion. Accordingly, the claim of systematic exclusion is rejected.

B. Prejudicial Remarks by a Strike Force Investigator

Movants aver that in November, 1976, prior to commencement of the grand jury proceedings in question, a strike force investigator made statements evincing improper bias on the part of the government and its predisposition to effect the indictment and prosecution of Movants. We find this allegation insufficient to justify the relief requested.

The ABA STANDARDS, *The Prosecution Function* § 3.5 (1971), provide that "[t]he prosecutor should not make statements . . . in an effort to influence grand jury action in a manner which would be impermissible at trial before a petit jury." Thus, Movants are correct that "it cannot be doubted that prosecutors must observe some limits of essential fairness in their work with grand juries."

However, this Court believes that the policy expressed by the Supreme Court in *Costello* v. *United States*, 350 U.S. 359 (1956) and *United States* v. *Dionisio*, 410 U.S. 1 (1973) weighs heavily against resting either dissolution of the grand jury or quashing any indictments said grand

jury may issue on the investigator's alleged remarks. As we noted in our discussion of ripeness, to subject the grand jury process to this kind of technical motion or similar dilatory pleas at the pre-indictment stage would saddle the grand jury with precisely the kind of "minitrials and preliminary showings" of which the Supreme Court expressly has disapproved.

We think that the better view was expressed in a similar context in *United States* v. *Rintelen*, 235 F. 787 (S.D. N.Y. 1916):

> A motion based on the conduct of the prosecutor before the grand jury should be adjudged insufficient unless it clearly shows prejudice to the deefndant *and indicates that the alleged irregularities affected the action o fthe grand jury.* (Emphasis added.)

As a predicate for the relief requested, movants must make a showing of prejudice and effect far beyond the minimum level of impropriety required for the direction of a mistrial had the misconduct taken place before a petit jury. *See, e.g., United States* v. *Riccobene*, 451 F. 2d 586, 587 (3rd Cir. 1971). *Cf. United States* v. *Mandel*, 415 F. Supp. 1033, 1042-43 (D. Md. 1976). Movants clearly have failed to make the required showing in this case.

Furthermore, Movants are incorrect in their assertion that these matters should have been disclosed to the grand jury. An accused generally has no right to have evidence in his favor presented to a federal grand jury. *See, e.g., United States* v. *Kaplan*, 554 F. 2d 958 (9th Cir. 1977); *United States* v. *Beasley*, 550 F. 2d 261 (5th Cir. 1977). *Cf. United States* v. *Barone*, No. 77-5238 (6th Cir. Aug. 1, 1978), *rejecting United States* v. *Estepa*, 471 F. 2d 1132 (2d Cir. 1972). Acordingly, relief on this ground is denied.

C. Privacy Act Claim

Movants claim that "[t]he Assistant U.S. Attorney has made direct and derivative use of documents and records of individuals unlawfully obtained by the Department of Justice from the Department of Labor in violation of the Privacy Act, 5 U.S.C. §§ 552a *et seq.*" This Court earlier ruled on this claim in an Order dated May 26, 1977. We held there that the records involved in this claim do not comprise part of a "system of records" within the meaning of the Privacy Act, and that in any case, the purpose to which the records were put by the Department of Justice falls within the "routine use" exception to the Privacy Act, 5 U.S.C. § 552a (b) (3). We briefly will elaborate on the basis for that Order.

Movants argue that the action taken by the government runs afoul of paragraph (b) (7) of the Privacy Act, which provides that,

> No agency shall disclose any record which is contained in a system of records by any means of communication to any person, or to another agency, except pursuant to a written request by or with the prior consent of, the individual to whom the record pertains, unless disclosure of the records would be
>
> * * *
>
> (7) To another agency or to an instrumentality of any governmental jurisdiction within or under the control of the United States for a civil or criminal law enforcement activity if the activity is authorized by law, and if the head of the agency has made a written request to the agency which maintains the record specifying the particular portion desired and the law enforcement activity for which the record is sought.

We conclude that the material involved here are not covered by the Act, and therefore find no violation of the provision cited above.

It is apparent from this provision that to be within its strictures the material involved must be: (1) a "record"; (2) contained within a "system of records"; and (3) pertaining to an "individual." The material on which this claim is based satisfies none of these requirements.

To be contained within a system of records as the term is used in the Act, the material first must constitute a record. 5 U.S.C. § 552a (a) (5). In turn, to constitute a record, the material must be "about an individual." *Id.* § 552a (a) (4). This is the point on which Movants fail.

The Union clearly is not an individual under the Act. The Act defines an individual as "a citizen of the United States or an alien lawfully admitted for permanent residence." *Id.* § 552a (a) (2). By using this definition, "Congress intended to distinguish between the 'rights which are given to the citizen as an individual under this Act and the rights of proprietorships, businesses and corporations which are not intended to be covered by this Act.' " *Shermco Industries, Inc.* v. *Secretary of the United States Air Force,* No. CA 3-77-1495-F, slip op. at n. 3 and accompanying text (N.D. Tex. May 2, 1978), *quoting* S. Rep. No. 1183, 93rd Cong., 2d Sess. 79 (1974), 4 U.S. Code, Cong. & Admin. News 6993 (1974). Movant Union therefore is not an individual under the Act, and the material involved here is outside its strictures insofar as it pertains only to the Union. Moreover, since the Union is not an individual, it lacks standing to make this claim. *Shermco Industries, Inc.* v. *Secretary of the United States Air Force,* No. CA 3-77-1495-F, slip op. at text accompanying nn. 4, 5.

Nor are the officers of the Union "individuals" within the Act for purposes of this litigation. The Act's definition of an individual also creates a distinction between "individuals acting in a personal capacity and individuals acting in an entepreneurial capacity. . . ," the latter being out-

side the Act. *Id.* at n. 4 and accompanying test, *citing* Office of Management and Budget [OMB] Guidelines, 40 F. Reg. 28591 (1975). The materials on which this challegene rests refer to Movants solely in their proprietary capacity as Union officials, not in their personal capacity. Therefore, the materials involved here also are outside the Act as far as these references are concerned. In addition, the individual Movants herein thus lack standing to raise the Privacy Act. *Id.*

Furthermore, as noted above, we also have concluded that even if these materials were covered by the Act, they would be within the "routine use" exception, 5 U.S.C. § 552a (b) (3). A "routine use" is the use of a record "for a purpose which is compatible with the purpose for which it was collected." *Id.* The material involved in this case was collected in the course of a Department of Labor investigation of the Union. We find that the use by the Department of Justice in the course of its own similar investigation of the Union is a use of the material "compatible with the purpose for which it was collected." *Compare Burley* v. *U.S. Drug Enforcement Administration,* 443 F. Supp. 619 (M.D. Tenn. 1977).

In sum, we find that the materials involved are not covered by the Privacy Act, Movants are without standing to make this claim, and that the materials would in any case be within the "routine use" exception. Furthermore, as we have concluded regarding many of the claims advanced herein, proof of a violation would not afford a basis for the relief requested. The validity of grand jury action is not affected by the character of the evidence on which it is based. *United States* v. *Calandra,* 414 U.S. 338, 344-45 (1974). Accordingly, we reject Movants' Privacy Act claim.

D. Exchange of Information Between Grand Juries

Movants' next claim is that "evidence and other information acquired by the Department of Justice during the course of the Special Grand Jury proceedings has been exchanged and interchanged by and between the grand juries impaneled in Cincinnati, Ohio, San Jose, California and in Cook County, Illinois." The government's response (both in its brief and at the hearing held on this matter) was that there was no exchange of information, but rather only a transfer of testimony and documents from the grand jury meeting in this district to a grand jury in Chicago. The government represented that Judge Hogan authorized this transfer by Orders signed on or about September 27, 1977 and November 11, 1977.

The government subsequently has informed this Court that its earlier response was in error. The actual sequence of events was as follows: Judge Hogan ordered that testimony taken before the March, 1977 grand jury in this district be disclosed to the February, 1977 Special Grand Jury meeting in the Northern District of Illinois. Judge Hogan, however, also ordered that the documents on which Movants' claim is based be returned to the parties from whom they were subpoenaed. The government, in compliance with this Order, returned the documents. These documents then were immediately subpoenaed by the Special Grand Jury in the Northern District of Illinois.

Movants have introduced no evidence that the facts are not as represented by the government. Thus, it appears that the transfer which did take place was accomplished in a lawful manner.

The Court doubts that Movants seriously would contest the subpoena power of the Illinois grand jury; in any case, the actions of that grand jury are of no effect in the present litigation. As regards the transfer of testi-

mony accomplished pursuant to Judge Hogan's Order, such disclosure of grand jury material was within his discretion. *See Pittsburgh Plate Glass Co.* v. *United States,* 360 U.S. 395 (1959); *United States* v. *Bryant,* 364 F. 2d 598, 600-01 (4th Cir. 1966); *U.S. Industries, Inc.* v. *U.S. Dist. Ct.,* 345 F. 2d 18 (9th Cir. 1965); 1 Wright, *Federal Practice and Procedure, Criminal,* § 106 at 175. Movants have introduced no evidence of abuse of discretion on the part of Judge Hogan. Accordingly, this claim is rejected.

E. Disclosure of Tax Returns

Movants also claim that "representatives of certain agencies . . . have improperly and in violation of 26 U.S.C. § 6013 disclosed the contents of individual tax returns and information contained therein to persons having no material interest in said tax returns for the purpose of obtaining statements and evidence from the person or persons to whom the returns and their contents were disclosed."

The evidence does show that early in 1978, John Olivero, Special Agent from the Intelligence Division of the Internal Revenue Service, interviewed Elizabeth Hanley, former spouse of Edward Hanley (President of Movant Union and an individual petitioner herein). This interview concerned violations of the Internal Revenue Code of which Mr. Hanley was suspected. At that time, Agent Olivero did show to Mrs. Hanley income tax returns signed by Mr. Hanley covering the years 1971-1976. Two of these returns, covering the years 1971 and 1972, were joint returns filed prior to their divorce and signed by both Edward and Elizabeth Hanley. Mrs. Hanley perused each of the returns and verified the signatures thereon.

The government contends that this disclosure was authorized under 26 U.S.C. § 6103 (k) (6), which provides:

> Disclosure by internal revenue officers and employees for investigative purposes.—An internal revenue officer or employee may, in connection with his official duties relating to any audit, collection activity, or civil or criminal tax investigation or any other offense under the internal revenue laws, disclose return information to the extent that such disclosure is necessary in obtaining information, which is not otherwise reasonably available, with respect to the correct determination of tax, liability for tax, or the amount to be collected or with respect to the enforcement of any other provision of this title. Such disclosure shall be made only in such situations and under such conditions as the Secretary may prescribe by regulation.

We need not reach the question whether the government's conduct violated the provisions cited by Movants. Even if disclosure of the tax returns themselves (as opposed to disclosure merely of return information (*compare* 26 U.S.C. § 6103 (b) (1) and (2)), did amount to a violation of the statute as asserted by Movants, such a violation would not be a basis for dissolving the grand jury or quashing any indictments it may issue. The Sixth Circuit recently has reaffirmed in *United States* v. *Barone,* No. 77-5238, — F. 2d — (August 1, 1978) that the validity of grand jury action is not affected by the character of the evidence considered. Quoting *United States* v. *Calandra,* 414 U.S. 338 (1974), the Court of Appeals stated:

> The grand jury's sources of information are widely drawn, and the validity of an indictment is not affected by the character of the evidence considered. Thus, an indictment valid on its face is not subject to challenge on the ground that the grand jury acted on the basis of inadequate or incompetent evidence. . . .

No. 77-5238, slip op. at 12, *quoting* 414 U.S. at 344-45. *See Loraine* v. *United States,* 396 F. 2d 335, 339 (9th Cir. 1968). We therefore deny relief on this ground. We do, however, find it appropriate to note that violations of this sort, if proved, might form the basis for a protective order at some future time.

F. Unauthorized Opening of Mail

Movants allege that "[i]n January and March, 1978, written correspondence addressed to certain officers of the Union . . . was delivered to the addresses with stamped notations on the envelopes that the letters had been 'opened in error' and officially resealed by 'I.R.S.' " Movants aver that this was part of a so-called "mail cover" operation by the government, whereby mail unlawfully was diverted to the Internal Revenue Service, examined, resealed, and then delivered to the addressees under the pretext of having been opened by mistake.

We need not inquire into the factual basis of this allegation, for the existence of such a violation still would not affect the validity of grand jury action or justify dissolving the grand jury. In *Loraine* v. *United States,* 396 F. 2d 335 (9th Cir. 1968), the Court stated, "[a]n indictment, if returned by a legally constituted and unbiased grand jury and valid on its face may not be dismissed because it is based upon . . . illegally seized evidence . . . ." *Id.* at 339. *See United States* v. *Barone,* No. 77-5238, slip op. at 12 (6th Cir. August 1, 1978). Therefore, the existence of a mail cover operation, if proved, would not be a basis for the relief requested. Instead, such proof would be relevant to the admissibility at trial of the contested evidence. We add that Movants have adduced no competent evidence even suggesting the existence of

such a "mail cover" operation. Thus, relief on this claim is denied.

G. Presentation of Evidence to Two Grand Juries

Movants' next claim is that "evidence and testimony regarding the Union and its officers, executive board members and personnel have been presented to two grand juries in contravention of Department of Justice regulations prohibiting such conduct."

This rather vague averment leaves the Court in a quandry regarding precisely what is being alleged. Our confusion is heightened by Movants' failure to direct the Court's attention to the specific regulations on which the claim rests. If Movants refer to simultaneous presentation to several grand juries, we are at a loss to find any legal impediment. This matter was to some extent discussed in section C, *supra,* regarding the transfer of information to a grand jury sitting in Chicago.

On the other hand, if Movants refer to the presentation to successive grand juries, the claim also is without legal basis. As the Sixth Circuit stated in *United States* v. *Barone,* No. 77-5238, — F. 2d — (August 1, 1978), "[f]ederal law does not forbid the resubmission of evidence to a grand jury after one or more previous grand juries have refused to indict." No. 77-5238, slip op. at 10, *citing United States* v. *Thompson,* 251 U.S. 407 (1920). This claim therefore is rejected.

H. Improper Use of the Subpoena Power to Conduct Private Interviews

Movants aver that "[t]he U.S. Attorney has improperly utilized the subpoena power for the purpose of interviewing and questioning potential witnesses, and advising some potential witnesses that they did not need an attorney, and such actions violated his obligation to place all favorable or mitigating evidence before said Grand Juries."

This claim also is groundless. We need not decide whether the government attorneys improperly advised witnesses that they need not obtain legal counsel, for such an eithical violation still would in no case be grounds for the relief requested here. If, however, hard evidence of such conduct were produced, we might find a protective order appropriate.

In regard to the use of the subpoena power to conduct interviews outside the grand jury room, we also are unable to discern legal grounds for dissolving the grand jury. Although it frequently is said that the Grand Jury's subpoena power may not be used to summon witnesses to the prosecutor's office for private interrogation, this notion does not prevent the government from interviewing subpoenaed witnesses before they testify before the grand jury, in order to ascertain the relevance of the proffered evidence, and the need to present it to the grand jury.

Movants' reliance on *Durban* v. *United States,* 221 F. 2d 520 (D.C. Cir. 1954) is misplaced. The Court in *Durban* did not hold that a prosecutor never can use the subpoena power to conduct interviews outside the grand jury room. To the contrary, *Durban* is distinguished by its facts from the case at bar. In *Durban* the prosecutor told a witness that he could not leave the city until

the prosecutor gave him permission to do so. This restraint continued despite the grand jury's having recessed. The witness left and was prosecuted for traveling in interstate commerce with intent to avoid giving testimony before the grand jury. The Court's decision turned on its finding that,

> [T]he [prosecutor] thought the grand jury subpoena empowered him to restrain appellant's movements indefinitely, or at least until appellant made a statement which satisfied him; and this despite the fact that the grand jury had recessed.

221 F. 2d at 522. The Court held that in such an egregious case the defendant could not be prosecuted for avoiding grand jury testimony.

The instant case clearly is not so extreme. *See United States* v. *Mandel,* 415 F. Supp. 1033, 1039 (D. Md. 1976). As the Court stated in *Mandel,* "[I]n the absence of compelling evidence of abuse of process such as that in *Durban* . . . , this Court will not dismiss an indictment because the prosecutors used the subpoena power to interview witnesses who were not subsequently brought before the Grand Jury." *Id.* at 1040.

Movants have failed to present evidence of the kind described in *Mandel.* Relief on this claim is denied.

Furthermore, we doubt that Movants are serious in their contention that the United States Attorney has an "obligation to place all favorable or mitigating evidence before . . . Grand Juries." Federal Courts unwaveringly have held that there is no such obligation.[3]

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[3] *See, e.g., United States* v. *Kaplan,* 554 F. 2d 958 (9th Cir. 1977); *United States* v. *Beasley,* 550 F. 2d 261 (5th Cir. 1977); *United States* v. *Y. Hata & Co.,* 534 F. 2d 508, 512 (9th Cir.), *cert. denied,* 429 U.S.

I. Threatened Witnesses

Movants' next claim is that "[T]he U.S. Attorney and those persons in active concert with him, while advising this Court that all executive board members were 'targets' of said investigation, have advised at least three targets while attempting to elicit information from said executive board members, and in addition have advised certain persons that they would be indicted if they did not proffer evidence in an interview." Movants' memorandum in support of their motion adds an additional claim under this heading: that the failure to disclose the alleged threats to the grand jury also was improper and a basis for relief.

Movants are incorrect on all counts. First, as noted above, government attorneys' improperly having given advice to potential witnesses would in no case be grounds for dissolving the grand jury.

In assessing the balance of this claim, *Mandel* is instructive. The Court stated:

> "[I]t is claimed that some witnesses were put in fear by being advised that they might be the subject of investigation themselves for unrelated activity in which they had been engaged . . . . The remarks were not made before the grand jury but in private interviews. . . . [T]he prosecutor's remarks could not have unfairly influenced the grand jury against the defendants . . . since it is not alleged that the grand jury ever knew about these remarks if they were in fact made. . . . Further, it is not alleged or suggested that the tactics of the prosecutors caused the

828 (1976) ("[w]e reject appellants' contentions that the prosecution must present the grand jury with evidence it may have which would tend to negate guilt."). *Cf. United States* v. *Guillette*, 547 F. 2d 743, 753 (2d Cir. 1976) (on obligation to notify grand jury of subsequent events which cast doubt on credibility of evidence underlying indictment).

> witnesses to change their minds and to testify against the defendant when they had planned to testify in his behalf. Defendant cannot show that he was prejudiced by the tactics attributed to the prosecution since his witnesses remained firm in the face of the alleged intimidation.
>
> "Nor does the court think that advising some witnesses that they might be the subject of an investigation themselves constitutes misconduct on the part of the prosecutors. On the contrary, it is the prosecutor's duty to make witnesses aware of any potential investigations so those witnesses can conduct their actions accordingly. . . ."

415 F. Supp. at 1042-43.

We find the above discussion to be on all fours with the present litigation, and accordingly deny relief based on the alleged "threats" by the prosecutors.

We also deny relief based on the failure to disclose these matters to the grand jury. Our reasoning is the same as that stated in the text accompanying note 3, *supra*. Movants' reliance on *United States* v. *DeMarco*, 401 F. Supp. 505 (C.D. Cal. 1975), is misplaced. "In that case, the disclosure required of the prosecutor went directly to the power of the grand jury to act at all. Exculpatory evidence, on the other hand, does not negate the entire authority of the grand jury and need not be disclosed." *United States* v. *Mandel*, 415 F. Supp. at 1041. This claim therefore is rejected.

J. Fourth Amendment Violations

Movants allege that "members of the special strike force and those in active concert with them have surreptitiously obtained certain documents and records in the custody of the Union and which were not listed in various subpoenas for the production of documents and records."

The gravaman of this claim seems to be that certain records and documents presented to the grand jury were obtained in an unlawful manner, were thus "fruit of the poisonous tree", and that relief should be granted on this basis. Again, this is a matter for trial at such time as Movants may be indicted and prosecuted. In regard to a motion to dissolve the grand jury or to quash an indictment issued by said grand jury, this claim is without legal basis. "[A]n indictment, if returned by a legally constituted and unbiased grand jury and valid on its face may not be dismissed because it is based upon hearsay testimony . . . , incompetent . . . , or illegally seized evidence . . . ." *Loraine* v. *United States,* 396 F. 2d at 339 (9th Cir. 1968). *See United States* v. *Calandra,* 414 U.S. 338, 344-45 (1974). Relief on this claim therefore is denied.

K. Improper Participation in Grand Jury Matters by a Labor Department Investigator

Movants aver that "William Shannon of the U.S. Department of Labor, who was in charge of the Department of Labor investigation of the International Union from September to December, 1976, has actively assisted the Assistant U.S. Attorney in the Grand Jury investigation."

We are unable to discern any violation of law in Mr. Shannon's assistance and participation. Movants rely on the Sixth Circuit's opinion in *General Motors Corp.* v. *United States,* No. 77-1599 — F. 2d — (April 5, 1978). As we pointed out to Movants at the hearing on this matter, the Court of Appeals having granted a rehearing *en banc* in the *General Motors* case, the opinion of the three-judge panel on which Movants rely automatically is vacated. *See* Sixth Circuit Rules of Appellate Procedure, Rule 14.

Furthermore, we find *General Motors* factually so different from the present litigation as to be no authority at all. In contrast to the facts involved in *General Motors,* Mr. Shannon, who is not an attorney, did not head the investigation, participated only at the request of the Department of Justice, and at no time was present in the Grand Jury Room. Furthermore, we have no reason to believe that Mr. Shannon had an "axe to grind," which was the case in *General Motors.* And most important, we find no danger that the grand jury at issue in the present litigation has been, or presently is being used for civil purposes.

Relief on this claim is denied.

L. Prejudicial Publicity

Movants' final claim is that "The Grand Jury proceedings have resulted in massive publicity regarding said proceedings in cities such as Chicago and Kansas City and the State of California."

This claim does not afford any basis for relief. Regarding pre-trial publicity as grounds for the kind of relief requested in this case, the following rules have evolved. Dissolution of a grand jury or quashing an indictment is appropriate only where the allegedly prejudicial publicity was: (1) substantial and unfavorable, *see, e.g., United States* v. *Anzelmo,* 319 F. Supp. 1106, 1113-14 (E.D. La. 1970); *United States* v. *DiLorenzo,* 49 F.R.D. 86 (S.D. N.Y. 1969); (2) generated by government conduct, *see, e.g., United States* v. *Tallant,* 407 F. Supp. 878, 889 (N.D. Ga. 1975); *United States* v. *Sweig,* 316 F. Supp. 1148 (S.D. N.Y. 1970), *aff'd,* 441 F. 2d 114 (2d Cir.), *cert. denied,* 379 U.S. 971 (1965); and (3) resulted in actual juror bias, *see, e.g., United States* v. *Archer,* 355 F. Supp.

981, 987-89 (S.D. N.Y. 1972), *rev'd on other grounds*, 486 F. 2d 670 (2d Cir. 1973); *United States* v. *Anzelmo*, 319 F. Supp. 1106 (E.D. La. 1970). In order to overcome the presumption of regularity which attaches to grand jury action, Movants must satisfy a stringent burden of proof. *See, e.g., United States* v. *Mitchell*, 372 F. Supp. 1239, 1248 (S.D. N.Y. 1973).

We find that Movants have failed to make the required showing that the publicity surrounding this case was caused by the government and resulted in actual juror bias. We place particular emphasis on our conclusion that Movants themselves are in large part responsible for the publicity which has attended this litigation. We take judicial notice that Movants filed a suit for injunction against certain proceedings in this case, which gave rise to a spate of publicity. Until Movants filed that suit, these matters carefully were kept under seal. In short, Movants have only themselves to blame for much, if not all, the publicity surrounding the proceedings.

This Court is guided by the logic of *United States* v. *Abbott Laboratories*, 505 F. 2d 565 (4th Cir. 1974), *cert. denied*, 420 U.S. 990 (1975):

> No case of which we are aware, nor any to which we have been referred, holds that without resort to the traditional means of effective protection of a defendant's right to fair trial, *i.e., voir dire*, change of venue, continuance, pretrial publicity has been so inflammatory and prejudicial that a fair trial is absolutely precluded and an indictment should be dismissed without an initial attempt, by the use of one or more of the procedures mentioned, to see if an impartial jury can be impanelled.

Id. at 571. With these principles in mind, this claim is rejected.

Interlocutory Appeal

At the close of oral argument on this motion, Movants' counsel requested that the Court certify this case for interlocutory appeal under 28 U.S.C. § 1292(b). That section provides in relevant part,

> When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals may thereupon, in its discretion, permit an appeal to be taken from such order . . . .

We find that this motion is not well taken, and it therefore is denied.

It is the Court's recollection that after the close of the record, counsel specifically stated that the matter on which he wished interlocutory appeal was "the *General Motors* issue," which the Court understood to mean movants' claim pertaining to William Shannon's participation in the grand jury's investigation, p. 28, *supra*. The Court subsequently has received from Movants' counsel a letter (ordered filed herein) requesting a statement from the Court enabling Movants to take interlocutory appeal of their claim under the Jury Selection Act, 28 U.S.C. §§ 1861, *et seq.*

While the Court does not seek to cast doubt on the *bona fides* of Movants' case, this inconsistency does suggest to us more zeal on the part of Movants to delay the grand jury proceedings than a good faith belief that interlocutory appeal is appropriate under § 1292(b). In any case, the Court concludes that neither of the matters raised by Movants provide such a "substantial ground

for difference of opinion" that certification for interlocutory appeal would be consistent with the purposes of the Act. Our reasoning is that already stated in this Opinion in regard to each of these matters.

As Judge Phillips stated for the Sixth Circuit in *Kraus* v. *Board of County Road Commissioners,* 364 F. 2d 919 (1966),

> 'It is quite apparent from the legislative history of the Act . . . that Congress intended that section 1292 (b) should be sparingly applied.' . . . Many months would be required before the case would be reached for argument on the congested docket of this court.

Id. at 922. (Citation omitted.) As was the case in *Kraus,* when the potential delay from interlocutory appeal, and the dispatch with which these matters might be handled in the future are weighed against the unlikelihood that such an appeal would be found well taken, and the potential injury to Movants, it is apparent that interlocutory appeal would be inappropriate.

/s/ DAVID S. PORTER

Chief Judge,
United States District Court

EXCERPT OF PROCEEDINGS BEFORE SPECIAL GRAND JURY – SEPTEMBER 18, 1978

* * *

Now, does anybody work for any labor union? Any close members of any of your family, that is your immediate family; wife, husband, brother, sister, son, mother, father any of the close members of our family work for any labor union or have any connection with a labor union?

We don't want you to think from these questions that we think labor unions are bad. That has nothing to do with the question. There is a possibility of some investigation by this grand jury into something that may be union-connected, and it's only one union, and that's why we ask because it would be embarrassing to somebody to be on the grand jury and run into that and have some connection with it.

All right. So would you read then, please, the next 21 names in point of call, Mr. Schultz; and as your name is called, will you please stand?

THE CLERK: * * *; Judith M. Anderson.

THE COURT: O. K. Now, Miss Anderson, you will be excused from service with this grand jury. That will also be true as a matter of discretion as to Miss Burwinkel –

A VOICE: Basford.

THE COURT: – Miss Basford. You also will be excused. Thank you for coming here today, and you are being excused from service for this grand jury.

* * *